No. 78-872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL.,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF FORT HOWARD PAPER COMPANY IN OPPOSITION

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Fort Howard Paper Company of Green Bay, Wisconsin ("Fort Howard") opposes the issuance of the writ of certiorari sought by the Petitioners to review the decision of the United States Court of Appeals for the District of Columbia Circuit in *National Association of Recycling Industries* v. *Interstate Commerce Commission, et al,* No. 77-1187 and consolidated cases.

OPINION BELOW

The August 2, 1978 opinion of the Court of Appeals, as modified by its October 16, 1978 *per curiam* opinion, has been officially reported since the filing of the Petition For Writ Of Certiorari (the "Petition"). *National Association of Recycling Industries* v. *ICC,* 585 F2d 522 (D. C. Cir. 1978). (Hereinafter cited as "NARI".)

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly applied the established standard of judicial review?

2. Whether the Court of Appeals exceeded its authority in ordering the Interstate Commerce Commission to complete its action on the remand within six months?

3. Whether as Petitioners claim, the Court of Appeals has preordained the results of the reopened proceedings before the Commission?

STATEMENT OF THE CASE

Introduction

In Section 204 of the Railroad Revitalization and Regulatory Reform Act[1] (the "4-R Act") enacted in February, 1976, Congress directed the Interstate Commerce Commission (the "Commission") to conduct an investigation into the rail freight rate structure on recyclable commodities and competing virgin resource materials. The statute required the Commission to make a determination as to whether the rate structure,

[1] Pub. L. No. 94-210, 90 Stat. 40 (1976).

as affected by successive general rate increases, is in whole or in part unjustly discriminatory or otherwise unreasonable. The statute also specifically imposed the burden of proof in this investigation upon the railroads to affirmatively show that the rate structure is just, reasonable and nondiscriminatory.

Proceedings Before the Commission

Shortly after the *4-R Act* was enacted, the Commission instituted the proceeding mandated by Section 204 denominating it *Ex Parte No. 319, Investigation of Freight Rates for the Transportation of Recyclable or Recycled Commodities.* The railroads were directed to present probative evidence involving some 3,000 movements of recyclable and virgin commodities.

Numerous interested shippers, including Fort Howard—a major consumer of wastepaper—participated in the proceedings submitting evidence concerning the various issues including the nature of the competitive relationships between the various recyclable or recycled products and counterpart virgin natural resource commodities; the cost of providing transportation services for such commodities and the numerous defects in the cost evidence submitted by the railroads; and the varying transportation characteristics of such commodities.

The Commission's Decision

In compliance with a statutory requirement that it complete its investigation within one year of the enactment of the *4-R Act,* the Commission issued its Decision in *Ex Parte No. 319* on February 4, 1977.[2]

[2] The Commission's Decision is set out in Petitioner's Appendix D. References to the appendix are to Pet. App. ——.

After analyzing the movements for which the railroads had submitted cost evidence, the Commission found that nearly one third of them should be eliminated, leaving only 2,125 movements of the more than 3,000 which had been studied. Pet. App. 17d. The Commission also found other major shortcomings in the nature of the cost evidence which was presented by the railroads. Pet. App. 23d-24d. However, despite the numerous deficiencies in the railroads' cost presentation, the Commission accepted it as meeting "the minimum requirements of this proceeding." Pet. App. 25d. Working with the cost data provided by the railroads, the Commission conducted a number of analyses but explained that "time does not permit the detailed analysis that we anticipated." Pet. App. 27d.

In its analysis of the rate structures for the various recyclable commodities and their counterpart natural resource commodities, the Commission focused first on the question of whether competition as contemplated by Section 204 existed between the recyclable and virgin commodities. The concept of competition employed by the Commission in this inquiry required that the recyclable and virgin commodities be competing *in fact*. Pet. App. 49d. In the case of wastepaper, as with most of the other recyclable commodities, the Commission found that the requisite competitive relationship with the counterpart natural resource commodities did not exist. Notwithstanding this finding, the Commission proceeded to make further findings that the rate structure on these commodities was not unjustly discriminatory based largely on demand elesticity and competition-related considerations. Pet. App. 241d-242d.

On the issue of rate reasonableness, the Commission's basic approach, as spelled out in its decision,

was to examine the extent to which recyclable traffic volumes were decreased as a result of continually increasing rates. Pet. App. 47d. For wastepaper, as for virtually all of the recyclable commodities, the Commission's conclusion, based on this perspective, was that the rate structure is reasonable.

Three of the Commissioners dissented from the Commission's Decision—one did not participate. Commissioner Christian, with whom Commissioner (now Chairman) O'Neal joined, explained that in her view the Commission had failed to come to grips with the essence of the discrimination issue, namely whether the obvious rate disparities in favor of virgin commodities were justified on the basis of differences in transportation conditions, and had shifted the statutory burden of proof from the railroads to the shippers. Pet. App. 322d-323d. Vice Chairman Clapp also faulted the majority for failing to face up to the "hard task" of determining whether the acknowledged disparities are warranted by differing transportation conditions. Pet. App. 324d. In addition, he stated that the concept of competition applied by the Commission was unrealistically narrow given the purpose and intent of Section 204 of the *4-R Act*.

The Court of Appeals Opinion

Several petitions for review of the Commission's Decision in *Ex Parte No. 319* were filed in the District of Columbia Circuit and were consolidated along with several related cases. *NARI*, 585 F2d, at 524-25. The United States, on behalf of the Environmental Protection Agency, as well as Fort Howard and other parties joined in challenging the Commission's order.

Based upon a comprehensive review of the legislative history and backgrounds of Section 204 of the *4-R Act*, the Court of Appeals concluded that the Commission had erred in its interpretation of its statutory mandate under Section 204 in a number of major respects. Initially, the court's opinion explains that the Commission seriously misapprehended "the significance of the statutory reversal of the burden of proof in Section 204." *NARI,* 585 F2d, at 533. Overall, the court agreed with the Commissioners that had dissented that:

> [t]he challenged order does not meaningfully address the focal question presented by its investigation, namely whether the substantial rate disparities between recyclable and virgin products are justified, in whole or in part, by the transportation characteristics of the products involved

NARI, 585 F2d, at 534 and that, as a result, the railroads had been relieved of their statutory burden of proof.

Concerning the issue of the reasonableness of the rate structures, the court identified a number of fatal defects in the Commission's Decision. Among these were: the Commission's exclusive reliance, without explanation and in departure from prior precedent, upon an extremely limited standard of rate reasonableness, which standard had the effect of thwarting the purpose of the entire investigation (*NARI,* 585 F2d, at 535-36); the acceptance in justification of the rate structure of railroad evidence which was completely devoid of any evidence concerning the effect of intermodal competition (NARI, 585 F2d, at 536); and according, in many instances, dispositive weight to

elasticity studies despite the inherent limitations in such studies—limitations acknowledged by the Commission itself.

The Commission's treatment of the discrimination inquiry was set aside by the court on the grounds *inter alia* that the standard of competition which had been applied was "so narrow in scope as to obviate the statutory purpose of its investigation" (NARI, 585 F2d, at 540). In light of the Commission's failure to fulfill its mandate under Section 204, the court vacated the Commission's order and remanded the matter for further proceedings.

On August 15, 1978, several weeks after the Court of Appeals' opinion was released, the National Association of Recycling Industries petitioned for rehearing and modification of the court's order to require the Commission to complete its proceedings upon remand within six months. This petition was opposed by the Commission and the railroads which argued that no time limitation should be placed upon the proceedings. On October 16, 1978, the court issued a *per curiam* decision (Judge Leventhal dissenting) granting the requested modification of its order in light of the clear congressional mandate for expedited consideration of this matter.

A petition for writ of certiorari was filed in this Court by the railroads on November 30, 1978. The Interstate Commerce Commission has not filed a petition for writ of certiorari. By decision served December 18, 1978 the Commission has reopened *Ex Parte 319* for further proceedings consistent with the decision of the Court of Appeals.

ARGUMENT

The Court Of Appeals Properly Applied The Established Standards Of Judicial Review In Its Decision To Remand This Matter To The Agency

In their Petition, the railroads' principal argument in support of their request that a writ of certiorari be issued is that the Court of Appeals transgressed the permissible bounds of judicial review by merely substituting its judgment upon the evidence for that of the Commission.[3] A reading of the Courts opinion is sufficient in itself to demonstrate that this contention is completely without merit.

In its opinion, the Court of Appeals properly recognized a number of different errors any one of which would be sufficient in itself to require a remand to the Commission. As related earlier herein, one of the principal errors which the court focused upon was the Commission's incorrect interpretation of its mandate under Section 204 of the *4-R Act* NARI, 585 F2d, at 530-34. It is axiomatic that it is within an appellate court's function and duty to inquire into the validity of a statutory construction adopted by an administrative agency. The Administrative Procedure Act, in defining the proper scope of review of a decision of an administrative agency, specifically provides that the reviewing court "shall interpret statutory provisions" and shall hold unlawful and set aside agency action "not in accordance with law." 5 U.S.C. § 706; *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission,* 390 U.S. 261, 272 (1968). As this Court stated in *NLRB* v. *Brown,* 380 U.S. 278, at 291-92 (1965):

> Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions.

On the basis of its own independent review of the legislative history of Section 204 of the *4-R Act* and the background developments leading to its enactment, the Court of Appeals correctly determined that the Commission's perception of its mandate in the *Ex Parte No. 319* investigation was fatally flawed. As the court explained:

> Unlike general revenue proceedings, this investigation was to proceed from the premise that disparate rate structures were not justified by the revenue needs of the railroads, and were therefore only to be upheld where actually warranted after consideration of all of the transportation characteristics, including the competitive relationships and costs of the materials involved.

NARI, 585 F2d, at 533. The Commission clearly did not, however, proceed on such a basis. To the contrary, it consistently emphasized the revenue needs of the railroads and, rather than requiring them to fulfill their statutory burden of proof by submitting probative evidence which would support the wide rate disparities which even the railroads infirm cost data re-

[3] Petition, at pp. 12-17. At page 14, Petitioners state their argument as follows:

> What the lower court did in this case was nothing other than to reweigh the evidence and choose to give more or less emphasis to one piece of evidence or factor in the ratemaking equation.

vealed, the Commission imposed the burden on the shippers to shows that the disparities were unlawful. NARI, 585 F2d, 529n33, 533.

Aside from the fatal error which it found in the Commission's overall perception of its mandate under Section 204 of the *4-R Act,* the Court of Appeals also found that several of its "underlying findings and conclusions" were "inadequately supported and arbitrary." Again, the court was clearly operating within the permissible scope of review in analyzing the Commission's findings. 5 U.S.C. § 706. It was also correct in its conclusions that the various Commission findings were improper. For example, in reviewing the Commission's analysis of the reasonableness of the rate structures, the court found that the Commission had improperly relied exclusively on two criteria of reasonableness: the extent to which volumes of recyclable commodities had been affected by increasing freight rates in the past and the extent to which the commodities could absorb the current rates. NARI, 585 F2d, at 535.

Traditionally, the Commission has looked to a wide variety of considerations in making determinations as to rate reasonableness. See *e.g. Burlington Northern, Inc.* v. *United States,* 555 F2d 637, 640 (8th Cir. 1977); *Westinghouse Electric Corp.* v. *United States* 338 F Supp 1309 (W.D. Pa. 1975). It is well established that an administrative agency may not simply disregard its prior norms and practices. Where it chooses to depart from prior norms it must provide some explanation as to its reasons for doing so. In *Secretary of Agriculture* v. *United States,* 347 U.S. 645, at 652-53 (1954) this Court ruled, in holding unlawful a Commission decision, that "the commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." More recently, in *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade,* 412 U.S. 800, 808 (1973), this Court stated that "whatever the ground for the [Commission's] departure from prior norms, . . . it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate."

As the Court of Appeals noted in this case, after defining the two criteria of reasonableness mentioned above the Commission ". . . applied no other standard of reasonableness and offered no explanation for its decision to focus exclusively on these criteria." NARI, 585 F2d, at 535 (footnote omitted). In *Westinghouse Electric Corp.* v. *United States, supra,* the court set aside a maximum reasonable rate determination because the Commission had failed to consider the several accepted standards of reasonableness.

In addition to its failure to consider other standards of reasonableness, or, failing that, to explain why the Commission also erred in that the standard in which it did fix upon was ill-suited to the purpose of the *Ex Parte 319* investigation. NARI, 585 F2d, at 536-36. Manifestly, the glaring defects in the Commission's inquiry into the reasonableness of the rate structures were more than sufficient, standing alone, to warrant the Court of Appeals' remand.[4]

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[4] As previously discussed in the statement of the case, the court also noted a number of subsidiary errors in the Commision's handling of the reasonableness issue.

Upon reviewing the Commission's treatment of the question of discrimination in the rate structure, the court found that the standard of competition applied by the Commission was "so narrow in scope as to obviate the statutory purpose of its investigation." NARI, 585 F2d, at 540. Once again, it is clear that the court was acting within the proper scope of judicial review in examining the standard of competition adopted by the agency. 5 USC § 706; *NLRB* v. *Brown, supra.* The court did not, as the Petitioners claim, "reweigh the evidence" on the question of discrimination. In fact, as Fort Howard argued before the Court of Appeals, the Commission's findings of no competition, even under the extremely narrow standard employed by the Commission, were, at least in the case of wastepaper, unsupported by substantial evidence in the record and indeed contrary to the weight of the evidence. However, the Court of Appeals' conclusion that the Commission's findings of no competitive injury could not be sustained was clearly based, not on the Commission's weighing of the evidence, but on the overly restrictive standard of competition utilized in its analysis. NARI, 585 F2d, at 540. Thus, if any challenge be made to the court's ruling on the Commission's discrimination findings, it must be that the court's interpretation of the competition standard contemplated by Section 204 was overly broad. Such an argument must fail.

As the background and legislative history of Section 204, which are discussed by the court in some detail, demonstrate, the essential purpose of the *Ex Parte No. 319* investigation was to ensure that disparities in the rail freight rate structures on recyclables and their natural resource counterparts did not unjustly inhibit

maximum consumption of recyclable commodities. The Congressional intent to foster the maximum possible use of recyclable materials in order to achieve all of the associated environmental benefits has been forcefully evidenced through a number of legislative enactments. See text and footnotes NARI, 585 F2d, at 531-32. By inquiring solely into the extent to which recyclables and natural resource materials were directly competitive in the sense of being directly substitutable one for another in the manufacturing process as evidenced by current consumption patterns and manufacuring practices, the Commission completely failed to consider the degree of competition which could exist if the existing freight rate disparities were eliminated. Thus the Court of Appeals was clearly correct in finding that:

> [t]he lawfulness of the rate structures was not to be governed by the fact that recyclable products had been unable to attain acual competitive status with virgin products under existing rates. Instead, we believe that to warrant dispositive findings of no competition the Commission was required to find that the various products were neither actually nor potentially competitive for transportation purposes.

NARI, 585 F2d, at 540.

It would unduly lengthen this brief to discuss all of the other errors which the Court of Appeals properly discerned in the Commission's Decision. As the above discussion establishes, the Court of Appeals acted well within the established scope of judicial review and had ample cause for its remand of this matter to the Commission.

The Court Of Appeals Direction To The Commission To Complete Its Proceedings Upon Remand Within Six Months Was Required In Order To Give Effect To The Congressional Mandate In Section 204 Of The *4-R Act* And Is Entirely Consistent With Established Precedent

In enacting Section 204 of the *4-R Act,* Congress was directly responding to the Commission's repeated refusals over a course of years to engage in any meaningful analysis of the possible adverse impacts of freight rate structures upon utilization of recyclable materials. See NARI, 585 F2d, at 527-28. Due to the magnitude of the public interest involved in this matter and the Commission's oft-demonstrated reluctance to come to grips with it, Congress found it necessary to impose a twelve-month time limit upon the investigation which it mandated. The statutory period ordained by the Congress expired on February 5, 1977. At the time of the court's remand, the determinations which the Congress sought were already more than a year and a half behind schedule. Thus, the six month limitation imposed by the court, if complied with by the Commission, will result in a decision a full two years later than contemplated by the statute.

Petitioners rely heavily upon this Court's decision in *FPC* v. *Transcontinental Gas Pipe Line Corp.,* 423 U.S. 326 (1976) as being in direct conflict with the action taken by the Court of Appeals in establishing a time frame for the Commission's proceedings upon remand. Petition, p. 21. However, as the very passage from this decision which Petitioners set out in their Petition makes clear,[5] this Court did not foreclose the

[5] "At least in the absence of substantial justification for doing otherwise, a reviewing court may not, after determining that additional evidence is requisite for adequate review, proceed by dictating to the agency the methods, procedures and time dimensions of the needed inquiry and ordering the results to be reported to the court without opportunity for further consideration on the basis of new evidence by the agency. Such a procedure clearly runs the risk of 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)."
FPC v. *Transcontinental Gas Pipeline Corp., supra,* 423 U.S., at 333. See Petition, P. 21.

type of action here taken by the Court of Appeals where "substantial justification" for such action is present. Moreover, this Court's comments in *FPC* v. *Transcontinental Gas Pipeline Corp., supra* were directed to a situation where a reviewing court directs an administrative agency to conduct a proceeding upon remand for the receipt of additional evidence and, at the same time, *"order[s] the results to be reported to the court without opportunity for further consideration on the basis of new evidence by the agency"* 423 U.S., at 333 (Emphasis added). Obviously, that is not the situation in this case. Here the Court of Appeals took elaborate pains to spell out that its findings were in no way to reflect upon the ultimate question of "the lawfulness of any of the rate structures involved" NARI, 585 F2d, at 522. In the proceedings which have been reopened, the Commission will have full opportunity for further consideration of all the evidence, old and new.

As far as "substantial justification" for the six month time limit may be concerned, it would be difficult to posit a situation in which the justification would be more compelling. Given the Commission's past history with recyclable commodities matters and the congressional deadline now exceeded by over a year and a half,

the time limitation is not only fully justified, but, at six months, very reasonable. Moreover, as Judge Leventhal noted in his dissent from the court's decision on rehearing, ". . . under the present order, the ICC can return and ask for an extension of time" NARI, 585 F2d, at 543.

The Court Of Appeals In Its Opinion Does Not In Any Fashion Preordain The Results Of The Reopened Proceeding Before The Commission

As mentioned above, the Court of Appeals was careful in its opinion to emphasize that its discussions were not intended to set forth its views upon the lawfulness of the various rate structures. It went on to state:

> They may be lawful, or they may not. In either event, it was for the Commission to decide initially based on an adequately supported consideration of the transportation characteristics of the products consistent with its mandate. We have concluded only that the Commission has not done so in this case.
>
> Nor, by our disposition, do we mean to intimate any view on the several contentions advanced relating to the measures the Commission should adopt in proscribing either maximum rates on recyclables or maximum rate disparities between recyclable and virgin products. All of these questions we leave to the informed judgment of the Commission, after full consideration of the railroads' justifications for disparities in the rate structures and the effect of the rate structures in terms of their actual and potential impact on the use of recycled products.

NARI, 585 F2d, at 541.

The only requirement which the Court of Appeals has imposed upon the Commission on the remand is to

apply in its analysis standards which are consistent with its mandate from Congress in Section 204 of the *4-R Act*. Petitioners' contentions that "the Commission will be under continuing pressure . . . to reach a different result" (Petition, page 25) are totally unfounded. Their suggestion that "the railroads will be seriously handicapped in a subsequent appeal to the lower court which has clearly indicated its own policy preferences" (Petition, p. 25) cannot be seriously entertained as grounds for granting the writ of certiorari which they have requested.

CONCLUSION

For all of the reasons discussed herein, Fort Howard respectfully urges that this Court deny the petition for writ of certiorari. The Commission has reopened the proceedings in *Ex Parte 319*. The long overdue results of this important investigation should not be further delayed.

Respectfully submitted,

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